THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2016-000986

Porthemos Curry.....Respondent/Appellant,

v.

Carolina Insurance Group of SC, Inc. and Maurice Derrick,.....Appellants/Respondents.

RESPONDENT/APPELLANT'S AMENDED FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The Customer, Mr. Curry, Has Demonstrated Substantial Prejudice

In its brief, Agency argues that "nowhere in his brief does Mr. Curry what prejudice he suffered." Amend. Resp. Br. at p. 6. Agency further argues that "there is no prejudice or surprise because Judge Newman continued the trial so that the issue of release could be fully briefed and argued pursuant to SCRCP 56" and asserts that because Customer's counsel consented to the continuance of the first day certain trial to allow the summary judgment motion to be heard, there was no prejudice shown. Id.

Customer respectfully submits that Agency's counsel is confusing the issue of the prejudice in the granting of the motion to amend with the consent by Customer's counsel – *after the motion to amend had already been granted* –to the continuance of the trial to allow counsel the requisite 10 days' notice, under Rule 56, to respond to Agency's summary judgment motion (filed at trial) on the newly allowed affirmative defense.

As more fully explained in his Amended Initial Brief, the prejudice stems from the granting of the motion to amend to assert a new defense on the first day of trial, thereby leading to the eventual cancellation of two date certain trials. See Holland v. Morbark, Inc., 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014). In Holland, the plaintiff, an injured mill worker, sought to amend his complaint – two years after the filing of the lawsuit – to advance a theory that the wood chipper at issue was defective under OSHA standards.

The trial court denied the motion to amend, holding that it would be prejudicial to the defendant where all scheduling deadlines had expired; all depositions had been taken; the case was on the trial roster; and advancing these new theories at the eleventh hour would require the defendant to incur significant additional costs. 754 S.E.2d at 718. The

trial court noted that the plaintiff "has long known about the possible relevance of the OSHA standard . . ." and that granting the motion to amend "would cause significant increases in discovery costs, at least some of which could have been avoided if [plaintiff] had timely moved." Id.

On appeal, the Court of Appeals affirmed the denial of the motion to amend, noting that the plaintiff had been on notice of this "new" theory since August 2010, but only elected to move to amend the complaint in January 2011, once the case had been transferred to the trial roster. Id. at 719. The Court of Appeals, recognizing that "prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action", found that "granting this amendment would have result in an inevitable delay on the eve of trial". Id. (citing Johnson v. Oroweat Foods Co., 785 F.2d 503 (4th Cir. 1986) ("finding prejudice can result when a proposed amendment is offered shortly before or during trial and raises a new legal theory that would require gathering and analysis of facts not already considered by the opposition."))

Similarly, here the first day certain trial in this matter, scheduled by the Honorable Alison R. Lee, Chief Administrative Judge at the time, commenced on Monday, April 18, 2016. The case had been pending for almost two years at that point; depositions of the parties, expert witnesses, and fact witnesses had been taken. Mediation had been conducted and the parties had conducted extensive written discovery as well. The jury was qualified the morning of April 18th, and the trial court considered various motions *in limine* throughout the afternoon. R. pp. 227-p.285. The trial was expected to last a week. It is undisputed that Agency was aware of Customer's settlement with Scottsdale, and the

existence of the Scottsdale Release, in November 2010 but did nothing, never requesting a copy of the executed Release for its file and never raising the issue until the eve of trial.

The prejudice to Customer is the time and expense associated with preparing for two (2) trials, both of which were ultimately cancelled due to Agency's last-minute filing of a motion to amend, such amendment relating to a settlement agreement of which Agency was on notice of almost 6 months prior. R. p. 446. Furthermore, the inclusion of the defense requires the Customer to present new evidence concerning the intent of the parties to the Release (including, necessarily, the testimony of the attorneys involved in the drafting of the Release and the settlement negotiations leading up to such agreement).

II. The Scottsdale Release is Not "Correspondence"

In Section III of its Brief, Agency argues that "counsel admitted that it was an error not to provide the executed release" in response to Agency's discovery requests. R. p. 8. This is a mischaracterization of the hearing transcript. At the hearing on the Motion to Amend on the first day of trial, Agency's counsel alleged that the release was responsive to Agency's discovery requests to Customer; however, it is undisputed that Agency's counsel never identified the request for production it was referencing to the Court; never submitted such discovery request to the Court for review; and never provided Customer's counsel with the alleged Request for Production at the time of the motion hearing.

As the hearing transcript reflects, if a Request for Production had, in fact, actually requested settlement agreements or releases or covenants not to execute, then Customer's counsel readily agreed that she would have been under a duty to produce it to Agency's counsel, as more fully outlined in Customer's Initial Brief. R. p. 252. However, after reviewing the Request for Production No. 6, it is clear that the Request only asks for

"emails, correspondence, receipts, bills, invoices, statements" between Customer and Scottsdale Insurance Company. Agency asks this Court to find the Scottsdale Release to be "correspondence" but provides no legal support for such a determination. See Amend. Resp. Br. at p. 8. In fact, under the generally held definitions of the word "correspondence", the Scottsdale release is no such thing, as more fully outlined in Customer's Amended Final Brief. See, e.g., Merriam-Webster Dictionary; Black's Law Dictionary; See also Times Mirror Co. v. Superior Court, 53 Cal. 3d 1325, 813 P.2d 240 (1991) (wherein the Supreme Court of California held that "correspondence means communication by letters") (cited with approval in Office of the Governor v. Washington Post, 759 A.2d 249, 268 (Ct. App. Md. 2000); Gandy v. Barber, C/A No. 1:12-cv-03331-MSK-MJW (10th Cir. 2016) (noting that "correspondence is defined [in Webster's Third New International Dictionary] as the communication between persons by an exchange of letters or any communication by letter.")

III. The Agency Received and Reviewed the Unsigned (Yet Identical) Release Over 4 Months Prior to Trial and Took No Action.

It is undisputed that the letter from J.R. Murphy dated November 25, 2015 did not indicate that the enclosures being sent to Attorney Peavy (i.e. the Scottsdale Release and the Stipulation of Dismissal) were also being sent to Attorney Peel, as the "cc:" portion of the letter did not indicate such an enclosure. Accordingly, counsel was mistaken when she represented to the trial court that the Agency did not receive a copy of the Scottsdale Release in November 2015. This representation was obviously incorrect; however, Agency's counsel did not attempt to correct this erroneous representation with the trial court. Candor toward the tribunal – and opposing counsel – would presumably have

required such action. Agency asserts that Customer "could have discovered the evidence prior to trial", citing *Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004) in support of its contention that the lower court properly denied Customer's Rule 60(b) motion.

However, *Bowman* is unpersuasive; in *Bowman*, a husband was fully aware of his wife's retirement plan and her reluctance to disclose it prior to trial. Thus, he could have obtained further evidence related to the asset prior to trial and his motion for relief was denied. *Id.* at 154. In the instant case, Customer could not have been aware that Agency had received the unsigned Release because JR Murphy's letter clearly did not indicate that a copy was being sent to the Agency. Furthermore, Customer could not have been aware that Agency intended to assert that it was a party to the Release (and therefore released from the lawsuit as a matter of law) when Agency had paid no money in settlement; had always denied that it was an agent of Scottsdale; had proceeded with discovery and expert depositions in the weeks leading up to trial; and had never requested a copy of the executed Release until April 8th – over 4 months after receiving the unsigned copy.

The *gravamen* of Customer's position, thus, is that the date when the Agency was able to review the terms and conditions of the Scottsdale Release was material and should have been fully disclosed at the hearing, by way of acknowledging to the trial court his receipt of the unsigned Scottsdale Release on November 30, 2015. Since Agency's counsel was in possession of the unsigned release over 4 ½ months prior to the date certain trial, the lower court abused its discretion in denying Customer's motion for relief pursuant to Rule 60(b) because the order was based on a factual conclusion that was erroneous. If receipt of the executed Release was so critical (as opposed to the identical but unexecuted

release), then it also begs the question as to why no request for same was made to Customer's counsel until 10 days prior to trial. Agency was on notice of at least the possibility of this new affirmative defense in November 2016 when it received, and presumably reviewed, the unsigned release.[1]

Conclusion

"Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Robinson v. Estate of Harris*, 388 S.C. 616, 698 S.E.2d 214 (S.C. 2010). For all the reasons stated in its Amended Final Brief, Customer respectfully requests that this Court issue an order finding that the lower court abused its discretion in granting the Agency's Motion to Amend and denying the Customer's Motion for Relief pursuant to Rule 60(b). Mr. Curry further requests that the Court issue an order striking the defense; dismissing the appeal of the Agency as moot; and remanding the case to the circuit court for immediate trial.

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January 25th, 2018

[1] In the Table of Contents and section IV of its Amended Brief, Agency asserts that "an executed release is in *(sic)* improper basis for any motion." Counsel presumes that Agency means to argue that an unexecuted release in an improper basis for a motion to amend, and has briefed this issue accordingly.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondent/Appellant's Amended Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Respondent/Appellant's Amended Final Reply Brief** on Wesley D. Peel, Esquire, Attorney for the Appellants/Respondents, at the address listed below by depositing a copy of same in the United States Mail, postage prepaid, on January 26, 2018.

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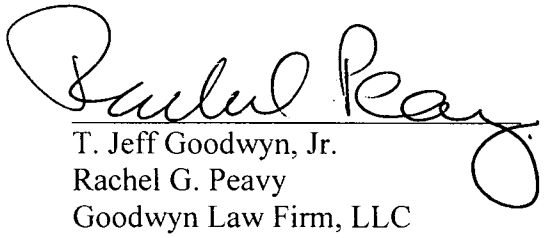

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